76-4701

IN THE
Supreme Court of the United States
OCTOBER TERM 1976

NO.

SOCIALIST WORKERS PARTY, PETER CAMEJO, AND WILLIE MAE REID,

Petitioners,

-against-

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AUTHORITIES

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The Socialist Workers Party and its 1976 candidates for President and Vice-President of the United States, Peter Camejo and Willie Mae Reid, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Opinions Below

The judgment of the Court of Appeals (App. A,

infra, p. 1a) is not reported. The order of the Federal Communications Commission (App. B, *infra,* pp. 2a-3a), upholding the staff ruling of the Agency (App. C, *infra,* pp. 4a-6a), is not reported.

The order of the United States Court of Appeals for the Second Circuit, transferring to the United States Court of Appeals for the District of Columbia Circuit the petition for review of the order of the Federal Communication Commission (App. D, *infra,* 7a-8a), is not reported.

Jurisdiction

The order of the Federal Communications Commission was announced on September 20, 1976 and released on September 22, 1976. FCC 76-875. On September 22, 1976, petitioners filed a petition for review in the United States Court of Appeals for the Second Circuit. On September 27, 1976, the Second Circuit Court of Appeals ordered the petition for review transferred to the United States Court of Appeals for the District of Columbia. On September 30, the Court of Appeals for the District of Columbia Circuit affirmed the Commission's order. The jurisdiction of this Court to review the case is invoked pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether Congress intended to exempt broadcast of non-studio debates between candidates for elected office from the equal opportunities requirements of 47 U.S.C. §315(a)?

Statute Involved

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. §315(a), provides, in relevant part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in use of such broadcasting station. . . . Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

Statement

This case arises out of petitioners' effort to obtain broadcast time on the CBS, NBC, and ABC television and radio networks equal in quantity and quality to that provided and to be provided for

the use of the Republican and Democratic parties' presidential and vice-presidential candidates in the series of "debates" sponsored by the League of Women Voters.

Petitioner Socialist Workers Party (herein "SWP") is a national political party which has participated in elections in the United States since its founding in 1938. The SWP has run candidates for president and vice-president of the United States in every presidential election since and including 1948. The national headquarters and principal office of the SWP is located in New York City.

Petitioners Peter Camejo and Willie Mae Reid are the SWP's 1976 candidates for president and vice-president of the United States.

The ticket of Camejo and Reid has been certified for the ballot in 25 states and the District of Columbia, which have a total of 323 electoral college votes, more than a majority.[1] In addition, certification is expected in New York and Washington states, having a total of 50 electoral votes, and litigation to get on the ballot is pending in Florida, with 17 electoral votes.

1. The SWP is certified for ballot status in Arizona, California, Colorado, the District of Columbia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, New Hampshire, New Mexico, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia and Wisconsin.

Facts

The essential facts of the present controversy are well known and not in dispute. The League of Women Voters entered into negotiations with representatives of the Democratic and Republican parties' presidential and vice-presidential candidates and with representatives of the major television and radio networks to arrange for the League's sponsorship of a series of televised debates between those candidates. The League agreed to sponsor the debates at a site other than the studios of the network affiliates. The League further agreed to certain conditions imposed by the representatives of the Democratic and Republican candidates, such as camera angles, podium heights, questioning format and restrictions upon coverage of the live audience reaction during or after debates. The major condition insisted upon by the Democratic and Republican candidates and agreed to by the League was that no other candidates for president or vice-president be included in the debates.

The League, the networks and the Democratic and Republican candidates agreed on a series of four debates, three between the presidential candidates and one between the vice-presidential candidates. The first debate, between the presidential candidates, took place on September 23 in Philadelphia, and lasted for 90 minutes. The second and third debates between the presidential candidates will take place on October 6 in San Francisco and on October 22 at an undetermined site. The debate between the vice-presidential candidates will take place on October 15.

Petitioners requested that the League of Women Voters include the SWP presidential and vice-presidential candidates in the debate (A-1).[2] The League denied petitioners' request by telephone.

Petitioners then demanded that the ABC, CBS, and NBC networks provide the SWP candidates with network time equal (both in terms of quality and quantity) to that to be provided to the Democratic and Republican Party candidates (A-2 to A-4). Petitioners' demands were made pursuant to Section 315 of the Communications Act of 1934, as amended, 47 U.S.C. §315(a). Each network refused to provide such time, taking the position that its coverage of the debates would be exempt from the statute's equal-time requirement as on-the-spot coverage of a bona fide news event (A-5 to A-7).

Following the denials by the networks, petitioners sought an order from the FCC requiring the networks to grant petitioners' requests for equal time (A-8 to A-9). On September 20, the Commission staff rejected petitioners' application in a written opinion. Review from the entire Commission was sought immediately and the Commission issued its final order denying the application on the same day.

The Commission's Ruling

In denying petitioners' application in the present case, the Commission relied entirely upon

2. References to "A- " are to pages in the "Appendix to the Petition" in the court of appeals. Copies can be lodged with the Court upon request.

its recent decision in *In re Aspen Institute Program on Communications and Society,* FCC 75-1090, 55 F.C.C.2d 697 (1975) (hereinafter "*Aspen Institute*"). In that case, the Commission held, over the dissents of Commissioners Robert E. Lee and Benjamin L. Hooks, that live uninterrupted television coverage of candidates debates, held outside a television studio and not sponsored by a broadcast licensee, comes within the bona fide news coverage exemption to the equal time provision of Section 315. *See* 47 U.S.C. §315(a)(4). The Commission explained that it would defer to the good faith determinations of broadcast licensees whether or not particular debates are bona fide news events, absent evidence of broadcaster favoritism or intent to promote a particular candidate or candidates.

In so holding, the Commission explicitly overruled its earlier decisions holding that such non-studio debates do not come within the subsection (a)(4) exemption, and that live coverage of them therefore triggers the equal time obligations of section 315(a).[3]

The *Aspen Institute* decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit in *Chisholm* v. *F.C.C.*, ____ *F.2d* ____ , No. 75-1951 (1975). Circuit Judge

3. The overruled decisions are *The Goodwill Station, Inc.*, 40 F.C.C. 362 (1962) and *National Broadcasting Company (Wyckoff)*, 40 F.C.C. 370 (1962). The Commission also held in the *Aspen Institute* case that live coverage of press conferences by presidential or vice-presidential candidates is exempt under the bona fide news coverage exception of subsection (a)(4), thereby explicitly overruling its decision in *Columbia Broadcasting System, Inc.*, 40 F.C.C. 395 (1964).

Wright dissented from the opinion of the panel, which was written by Circuit Judge Tamm and concurred in by Circuit Judge Wilkey. Petitions for certiorari, filed by Chisholm and by the Democratic National Committee, are pending before this Court. Nos. 76-101 (*DNC*); 76-205 (*Chisholm*).

Judicial Proceedings

Petitioners sought review of the Commission's order in the United States Court of Appeals for the Second Circuit, pursuant to 47 U.S.C. §402(a) and 28 U.S.C. §§ 2341, 2343. Petitioners argued that due to the unique nature of candidate debates, it would be impossible to provide broadcast opportunities equal in *quality* to that being provided to the Democratic and Republican Party candidates unless petitioners were allowed to participate equally in the remaining debates. In the alternative, petitioners sought network "prime time" equal in quantity to that being provided to the Republican and Democratic candidates.

The court of appeals expedited the case and set it down for oral argument on September 28, 1976. On September 27, 1976, however, the court of appeals granted the Commission's motion to transfer the case to the Court of Appeals for the District of Columbia Circuit, on the grounds that the District of Columbia Circuit already had decided the issues raised in the present case when it decided the *Chisholm* case.

The District of Columbia Circuit refused to hear oral argument to reconsider its holding in the *Chisholm* decision. It affirmed without opinion on the authority of that case.

Reasons For Granting the Writ

1. As the court of appeals recognized in its *Chisholm* decision, the question presented here "concerns perhaps the most important interpretation of the equal time provision . . . which has arisen in the past decade" (slip op. at 3). The question is especially critical in the present case, which arose in the context of an ongoing election campaign for president and vice-president.

Concern about the potential impact of the broadcast media on the nation's political and social affairs has run high in Congress, the administrative agencies, and the courts ever since the introduction of radio and television into the everyday lives of most Americans. See, *e.g., Red Lion Broadcasting Co.* v. *F.C.C.* 395 U.S. 367. The potential for abuse and favoritism in the coverage of issues of public importance, and especially of political campaigns, led Congress to enact specific safeguards. Of particular interest here is Section 315 of the Communications Act, which guarantees political candidates equal opportunities in the use of broadcast facilities during the course of their campaigns.

In enacting section 315 and the amendments to it, Congress considered the fact of the limited access to the broadcast medium, the interests of the public in the maximum receipt of news about all candidates running for office, the rights of minority candidates and parties and the important role they have played in United States history and United States political development, and the narrow and centralized control exercised over the broadcast medium by the few large broadcasting

corporations. Most important was a recognition of the enormous power of television and radio to shape public awareness and attitudes, and a corresponding concern about the dangers of the use of such power.[4]

Congress struck a careful balance among these values and interests when it amended section 315 in 1959 to include the four bona fide news exemptions to the equal time requirement, while rejecting proposals for broader exemptions or repeal of the statute. It maintained that balance in succeeding years despite pleas from the networks and the F.C.C. that it change the balance.[5]

In 1962, the F.C.C. reviewed Congress' pronouncements on the equal time issue, and, in two opinions, held that section 315 barred the broadcast of non-studio debates between or among candidates for electoral office, unless all other candidates for the same office were granted equal time. *National Broadcasting Co.* (*Wyckoff*), *supra*; *The Goodwill Station, Inc., supra*. The two deci-

4. See *Hearings on S. 1585, S. 1604, S. 1858 and S. 1929 Before the Subcomm. on Communications of the Sen. Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. at 51-52, 67, 71, 73, 76, 90, 260 (1959) (hereafter, *1959 Senate Hearings*); *Hearings on H.R. 5389, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602, H.R. 7985 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. at 5, 12, 15, 104 (1959) (hereafter, *1959 House Hearings*); *See also* 105 Cong. Rec. 14440 (Sen. Pastore), 14442 (Sen. Engle), 14443 (Sen. Holland), 14450-51 (Sen. Engle), 17778 (Rep. Harris), 17829 (Sen. Engle), and 17831 (Sen. Scott) (1959).

5. Congress did deviate from its 1959 decision in 1960 when it suspended the equal time requirement for the 1960 presidential campaign. See *post* at pp. 17-18.

sions were officially reported to Congress for its consideration and review, pursuant to statutory requirements. Public Law No. 86-274, 73 Stat. 537, Section 2(a), (b). See *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 533 & n. 15. Congress took no action to amend section 315, nor did it suggest to the Commission that its decisions were an incorrect reading of the statute. As a result, the Commission's 1962 decisions remained the authoritative interpretation of section 315 vis-à-vis candidate debates and the scope of the "bona fide news event" exemption to the equal time requirement, 47 U.S.C. §315(a)(4).

In 1975, the Commission abandoned its prior interpretation of the statute which had been settled for over ten years. Its *Aspen Institute* decision threw into disarray and confusion a question of great potential importance to every election campaign conducted in the United States. It threatens to have a profound effect in the present election campaign on the relative ability of the various candidates to reach the public through use of the broadcast medium. The present case thus raises one of those questions of primary and fundamental importance, involving values and concerns at the core of our democratic system, which this Court must definitively decide.

2. Review by this Court is especially necessary because the Commission's interpretation of section 315, affirmed by a divided court of appeals, is clearly erroneous and in effect completely rewrites the statute.

Prior to its amendment in 1959, section 315 simply had required broadcasters to grant candi-

dates for office equal time in the "use" of broadcast facilities. For many years, the Commission had defined the term "use" in section 315 broadly, and had interpreted the statute as barring the broadcast of candidate debates unless the equal time requirement was adhered to. *Letter to "Mike" Monroney,* 10 P&F Radio Reg. 451 (1952); *Use of Broadcast Facilities by Candidates for Public Office,* FCC Public Notice, September 8, 1954, FCC 54-1155 9105. On the other hand, the Commission had interpreted Section 315 as not requiring equal time for licensee coverage in a *newscast* of a candidate's appearance or activities, provided that the candidate did not directly or indirectly initiate the presentation or the filming of the event. *Allen H. Blondy,* 40 F.C.C. 284, 14 P&F Radio Reg. 1199 (1957); *Use of Broadcaster Facilities by Candidates for Public Office,* Public Notice FCC 58-936, III-12.

The latter interpretation was cast aside in the "*Lar Daly*" case, *Columbia Broadcasting System,* 18 P&F Radio Reg. 238, *reconsideration denied,* 26 F.C.C. 715, 18 P&F Radio Reg. 701 (1959), in which the Commission reinterpreted Section 315 to require that equal time be provided to all candidates for the appearance of any candidate on a regularly scheduled newscast.

The Commission's ruling in the *Daly* case caused consternation in the press and in Congress. It was to ameliorate the impact of the ruling on television and radio coverage of election campaigns that Congress undertook to amend Section 315.

The 1959 amendment was intended as narrow remedial legislation aimed at overruling the

holding and doctrine of the *Lar Daly* case. Congress rejected efforts at a broad restructuring of Section 315, and attempted only to return to the status quo which existed before the *Daly* decision. As Senator Pastore, the Senate floor leader, put it:

> Let us be positive about this. Generally all we are doing is restoring the situation insofar as news is concerned to that which existed for 32 years, before the Lar Daly decision.

105 Cong. Rec. 14455 (1959). See also the remarks of Senator Pastore *id.* at 14440, 14441-14442, 14456. Representative Harris, the House floor leader, placed the amendment in the same context:

> The Lar Daly decision abandoned this traditional concept and it is the primary purpose—listen to me—it is the primary purpose of this legislation to write back into section 315 this traditional exemption from the equal-time requirement and to deal with other things that always have been thought to be exempted from the equal time requirement.

105 Cong. Rec. 16229 (1959).

We thus see that the Commission's view of the 1959 amendment as broadly remedial, concurred in by the *Chisholm* majority, misreads and misconstrues the legislative history. No specific reference to any such broad intent is essayed by either the Commission or the court. There thus is no warrant for the broad approach taken in the interpretation of the amendment by those bodies.

Rather, since the purpose of the amendment merely was to restore the status quo before *Daly*, and since that status quo had precluded candidate debates, the issue here seems an easy one.

Further examination of the legislative history is even more dispositive. It reveals first that Congress considered and explicitly rejected attempts to enact a specific candidate debate exemption to section 315. As Judge Wright's dissent in the *Chisholm* case reveals, slip. op. at 7-9, 12-16, both the House and Senate committees purposely eliminated such a specific exemption from the bills which they reported to the full House and Senate, on the grounds that it would have gone far beyond what was necessary to overrule *Lar Daly*.

Second, the legislative history reveals that members of the congressional committees, other members of both houses of Congress, network representatives, Justice Department representatives, and the Commission itself were all agreed that without a *specific* debates exemption debates would not be exempt from the general equal time requirement under one of the four "bona fide news" exemptions. See dissenting opinion of Judge Wright, slip op. at 7-19.[6] Thus, the Commission's view that elimination of the specific debates exemption was irrelevant because debates could be included within the "bona fide news event"

6. See *Hearings on H.R. 5389 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong. 1st Sess., 134-135, 146, 128-129, 141, 171, 181-182, 184, 78-79, 80-82, 189 (1959); *Hearings on S. 1585 Before the Subcommittee on Communications of the Senate Committee on Interstate and Foreign Commerce*, 86th Cong. 1st Sess., 101-105, 261-262, 309, 315 (1959).

category is belied by the clear understanding of the Congress.

Finally, analysis of the legislative history and the statutory language reveals that Congress intended a "bona fide news event" exemption to be narrow and limited. Only events which are not staged for the explicit purpose of furthering a particular candidacy, which would occur without the appearance of any specific candidate, which would go forward irrespective of the presence of television or radio coverage and whose broadcast format is controlled by the licensee can be interpreted as "bona fide news events" within the intent of Congress.[7]

Debates meet none of these criteria. Rather, as Commissioner Hooks wrote in his dissent in the *Aspen Institute* case:

> I do not consider either a debate or press conference to be the type of spontaneous, apolitical occurrence Congress regarded as a conventional news event. Both, and particularly debates, are a species of quasi-news used as potent devices for the promulgation of the claims of a political candidate in the course of an election; they are *staged, structured and premeditated campaign tools* imparting very little of news value which cannot now be broadcast within a 'bona fide

7. *H.R. Report No. 802*, 86th Cong. 1st Sess., 6 (1959); *Senate Report No. 562*, 86th Cong. 1st Sess., 11 (1959); *1959 Senate Hearings* at 2, 4, 219; 105 Cong. Rec. 14446, 16225 (1959); *H.R. Report No. 1069*, 86th Cong. 1st Sess., 4 (1959).

newscast' where such news is already exempt under §315(a)(1). Indeed, both are unlikely vehicles for the formation of hard news.

* * *

Political debates on the other hand, are hard to imagine as fast-developing news exigencies, since they are ordinarily *scheduled long in advance, with partisan hype and hoopla,* and *the issues in a debate are framed and restricted by the disposition of the participants.* Moreover, and most important from the standpoint of assuring at least a modicum of coverage equality, a candidate not invited to participate in a debate is at a double disadvantage; not only does the uninvited candidate miss the exposure and opportunity provided by participation in the debate itself, our ruling today means that the uninvited candidate is not entitled to any other time to compensate for opponent appearances on debate. The spirit of §315, ergo, has been separated from the body.

55 FCC 2d at 714 (emphasis added).

Commissioner Hooks' warning could well have been directed at the proposed debates at issue here. They are staged, structured campaign tools to further the election prospects of two candidates to the disadvantage of all others. The issues to be discussed are framed and restricted in advance by

the candidates through negotiations with the sponsor. Even the format of television coverage is restricted by the candidates: The broadcasters are not allowed to televise the reactions of the "audience." And the dependence of the existence of the debates upon the fact of television coverage itself was demonstrated when technical difficulties caused the audio portion of the television coverage to break down during the first debate. Rather than continue in the face of this failure, as any *bona fide* news event would have, the debate was suspended until the technical problem was corrected. It simply is inconceivable that the Congress which enacted subsection (b)(4) intended that such a staged political showpiece would be exempt as *bona fide* news event.

This view is confirmed by the 1960 legislation enacted by the 86th Congress—the very Congress which wrote the 1959 amendment suspending section 315(a) for the 1960 presidential campaign. S.J. Res. 207, 86th Cong. 2d Sess. (1960) (Pub. L. No. 86-677, 74 Stat. 554). While the suspension was total and not restricted to permitting the Nixon-Kennedy debates of that year, the necessity for suspension to allow the candidates to debate free from equal time requirements was understood and foremost in the legislators' minds. Thus during the Senate Hearings, broadcasters,[8] other witnesses[9]

8. *E.g.*, "The position that I am taking is that I would like to have section 315 amended to permit debate. . ." *Hearings on S. 3171 Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 86th Cong. 2nd. Sess., 195-196 (1960) (Mr. Stanton of CBS). *Id.* at 234 and 272 (Messrs. Sarnoff and Adams of NBC).

9. *E.g.*, "Before time for a series of speeches or debate could be

and Senators[10] agreed that since Congress had specifically rejected an exemption for debates in 1959, an amendment to permit debates was imperative. In addition, no distinction between studio and non-studio debates was articulated during the Senate debate because it was recognized that *any* appearance would be the subject of extensive discussions and negotiations between the candidates and broadcasters.[11]

Although the House did not hold hearings or issue a report on the resolution, it too recognized that if debates between the candidates were to take place free from the equal time requirement, legislation was required.[12]

This clear understanding by the very Congress which enacted the 1959 amendment that the amendment did not allow an exemption for candidate debates cannot be explained away by

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provided, this section would have to be amended to relieve [the broadcasters] of the obligation to provide equal time. . . [L]egislation would be necessary in any event. I understand that there was strong opposition in the Congress last year to a general exemption of political debates from the equal-time requirement." *Id.* at 7 (Adlai Stevenson).

10. *E.g.*, "I think it was a mistake in having it [the debate exemption] deleted . . . but that was the sense of the Congress. . . It is true today if the stations or networks were to offer an opportunity of debate to two candidates, they subject themselves to granting equal time to all other candidates for the same office. . ." *Id.* at 188 (Sen. Pastore); see also *id.* at 194.

11. 106 Cong. Rec. 14474 (1960)(Sen. Pastore).

12. *E.g.*, 106 Cong. Rec. 17063 (1960) (Rep. Harris).

the Commission's references to the experimental nature of the suspension or to the fact that the suspension was broader in scope than a mere amendment to allow debates. While the suspension of Section 315 may have been experimental and broad, the fact that it was considered *essential* to permit the debates between the presidential candidates that year is the crucial and relevant fact.

3. The Commission's holding that *definition* of what constitutes a bona fide news event should be left to the discretion of the broadcast licensee runs directly counter to the clearly expressed congressional concern. To be sure, Congress recognized a role for broadcaster discretion and acknowledged the risk that the granting of discretion would undermine the equal time principle. It was precisely because of that risk, however, that Congress limited the scope of broadcaster discretion to decisions whether or not to cover news concededly within one of the four bona fide news exemptions. Congress was careful *not* to extend that discretion to the threshold decision of whether or not a particular kind of event by definition falls within one of the four exemption categories. See *Senate Rep. No. 562, supra* at 11-12, 13; *1959 House Hearings* at 80-82, 142-143, 189-193; 105 Cong. Rec. 14442.

Indeed, the Commission's grant of discretion to the licensees effectively undermines the entire force of section 315 and renders superfluous the other three exemptions to it. It would allow any event, even a set political stump speech, to be televised on-the-spot as a bona fide news event provided the broadcaster cannot be shown to have acted in bad

faith. See the Commission's decision in the *Wyckoff* case, *supra,* 40 FCC at 371.

The Commission's decision will also frustrate the clearly expressed congressional intention to maintain close oversight of the implementation and impact of the 1959 amendment. See the dissenting opinion of Judge Wright in *Chisholm, supra,* slip. op. at 43-46.

4. Both the *Chisholm* majority (slip. op. at 17-18) and the United States in its opposition in the *DNC-Chisholm* case (Brief for the United States in Opposition at 10) acknowledge that the legislative history is susceptible of the reading urged here. The court of appeals held, however, that the Commission's interpretation of the statute should be accorded deference, and the United States urged that certiorari be denied on that basis.

Judicial deference to the Commission's *Aspen* ruling is particularly inappropriate. This is not a case in which the agency is acting to fill in the interstices of a statutory scheme. Rather, the Commission has sought to construe the scope of a statutory exemption, and has held that the result it reaches is *compelled* by the legislative history. The courts are at least as expert as the Commission in deciding such questions.

This is especially true in light of the shifting position of the Commission over the years and its obvious uncertainty on the question. We are not dealing with a consistent contemporaneous agency interpretation. Indeed, the *Aspen* ruling overruled such an interpretation. The question is raised as to which agency interpretation is due deference, the

1962 rulings or the 1975 ruling. Surely the mere happenstance that the *Goodwill* and *Wyckoff* decisions were not appealed to the courts while the *Aspen* decision was should not be outcome determinative as to the correct construction of the statute.

In light of the above considerations and the importance and sensitivity of the question to the electoral process, the definitive construction of section 315(a) should be made by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners.

October 4, 1976

APPENDIX A

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING THE PETITION FOR REVIEW OF THE ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

The order of the Court of Appeals was issued on the afternoon of September 30, and was read to counsel on the telephone. A copy of the order was not received in time to include in the petition. It will be submitted to the Court immediately upon receipt by counsel.

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 76-875
42469

In re Complaint of)
)
Socialist Workers 1976)
National Campaign Committee)
)
against)
)
American Broadcasting Companies, Inc.)
)
and)
)
National Broadcasting Company, Inc.)
)
and)
)
CBS, Inc.)

ORDER

Adopted: September 20, 1976; Released: September 22, 1976 By the Commission: Commissioner Fogarty not participating.

1. The Commission has before it an oral Application for Review of the Broadcast Bureau's ruling of September 20, 1976, filed September 20, 1976 by Socialist Workers 1976 National Campaign Committee.

2. Pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS
COM MISSION
Vincent J. Mullins
Secretary

APPENDIX C

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
September 20, 1976

Socialist Workers 1976 National
Campaign Committee
c/o Leonard Boudin, Esq.
30 East 42nd Street
New York, New York 10017

Gentlemen:

This is in reference to your telegram to the Commission dated September 10, 1976, on behalf of Mr. Peter Camejo and Ms. Willie Mae Reid, Socialist Workers Party candidates for President and Vice President. You stated that the ABC, CBS and NBC television networks had denied your request for equal time to that being afforded the Democratic and Republican Presidential and Vice Presidential candidates "in the forthcoming debate[s]"; and that this Commission should order the networks to afford Mr. Camejo and Ms. Reid equal opportunities.

As you are aware, if a licensee permits any person who is a legally qualified candidate for any public office to use a broadcasting station, he must afford "equal opportunities" to all other such candidates for that office in the use of such broadcasting station. If a legally qualified candidate appeared on a bona fide newscast, bona fide news interview, bona fide news documentary, or on-the-spot coverage of a bona fide news event, such an appearance will not be deemed a use of a broadcasting station

for purposes of Section 315.

In *Aspen Institute,* 55 FCC 2d 697 (1975), the Commission ruled that where a debate between two candidates is arranged by an independent party not associated with any candidate or broadcaster and is broadcast live* and in its entirety, the broadcast of such debate is "on-the-spot coverage of a bona fide news event" within the meaning of the exemption contained in Section 315(a)(4), and would thus not be subject to equal opportunities. As the Commission stated in that ruling, "Congress intended that the Commission would determine whether the broadcaster had in such cases made reasonable *news judgments* as to the newsworthiness of certain events and of individual candidacies and had afforded major candidates broadcast coverage." *Id.* at 705. The Commission further stated that it would allow "reasonable latitude for exercise of good faith news judgments by broadcasters and networks by leaving the initial determination as to eligibility for Section 315 exemption to their reasonable good faith judgment." *Id.* at 708.

You have not provided any specific information to show that the proposed debates currently being organized by the League of Women Voters do not

* In *Delaware Broadcasting Company (WILM),* ___ FCC 2d ___ (FCC 76-873. September 16, 1976) the Commission modifed the requirement for "live" broadcast, ruling that "the delayed broadcast of a bona fide news event does not necessrily remove the Section 315 exemption from that broadcast," although the length of the delay would be "a factor in determining the broadcasters reasonableness and good faith," and a delay in excess of one day, in the absence of unusual circumstances, "would raise questions concerning whether the broadcast was 'on-the-spot coverage of bona fide news events.'"

satisfy the requirements established in *Aspen Institute* to be considered "on-the-spot coverage of a bona fide news event" exempt from equal opportunities obligations.

In view of the above, no Commission action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,
William B. Ray, Chief
Complaints and Compliance Division
for Chief, Broadcast Bureau

cc: NBC
ABC
CBS
PBS
Counsels

APPENDIX D

Order of the Court of Appeals, Sept. 27, 1976

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of September, one thousand nine hindred and seventy-six.

Socialist Workers Party, Peter Camejo and Willie Mae Reid,

Petitioners,

v.

Federal Communications Commission and United States of America,

Respondents.

It is hereby ordered that the motion made herein by counsel for the respondent dated September 24, 1976 to transfer the petition for review herein to the United States Court of Appeals for the District of Columbia be and it hereby is granted.

STERRY R. WATERMAN
ELLSWORTH VAN GRAAFEILAND
Circuit Judges
CONSTANCE BAKER MOTLEY
District Judge

No. 76-470

In the Supreme Court of the United States

OCTOBER TERM, 1976

SOCIALIST WORKERS PARTY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WERNER K. HARTENBERGER,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

STEPHEN A. SHARP,
Counsel,
Federal Communications Commission,
Washington, D.C. 20554.

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners are a political party and its candidates for President and Vice-President. They sought broadcast time on the CBS, NBC, and ABC radio and television networks, pursuant to the equal opportunities provision of 47 U.S.C. 315(a), contending that they were entitled to time equal to that provided for the coverage of the debates between President Ford and Governor Carter sponsored by the League of Women Voters.[1] When the networks declined to provide such time, petitioners sought an order from the Federal Communications Commission requiring the networks to do so (Pet. 6).

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[1]Petitioners also requested the League to include the two candidate petitioners in the debates. The League declined (Pet. 6).

Petitioners' complaint to the Commission did not allege facts or make arguments materially different from those considered by the Commission in *Aspen Institute Program on Communications and Society,* 55 F.C.C. 2d 697, affirmed *sub nom. Chisholm* v. *Federal Communications Commission,* C.A. D.C., Nos. 75-1951 and 75-1994, decided April 12, 1976, petitions for a writ of certiorari pending, Nos. 76-101 and 76-205. They informed the Commission that they believed that *Aspen* was wrongly decided and told the Commission that if it did not reconsider its decision, they would seek judicial review.

On September 20, 1976, the Commission's staff issued a Memorandum Opinion and Order (Pet. App. 4a-6a) denying relief because no facts had been alleged to distinguish this case from *Aspen Institute.* An application for review of the staff ruling was denied by the Commission by an order released on September 22, 1976 (Pet. App. 2a-3a). That same day petitioners petitioned for review of the Commission's order. The court of appeals[2] affirmed the Commission's decision on September 30, 1976 (Pet. 8).

The instant petition involves issues identical to those now before the Court in Nos. 76-101 and 76-205. We rely upon our Brief in Opposition to those petitions, a copy of which is being furnished to petitioners.[3]

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[2]The petition was filed in the Second Circuit but was transferred by that court to the District of Columbia Circuit by order of September 27, 1976 (Pet. App. 7a-8a).

[3]We add only that petitioners err in suggesting that the Commission would "allow any event [to be exempt from the equal time requirements] provided the broadcaster cannot be shown to have acted in bad faith" (Pet. 19-20). Although "good faith" is certainly an important consideration, the Commission concluded that Congress also intended the Commission to determine whether the broadcaster had "made *reasonable* news judgments" as to newsworthiness. *Aspen Institute, supra,* 55 F.C.C. 2d at 705 (emphasis added). Thus broadcasters must act both reasonably and in good faith in determining that a debate or press conference is a bona fide news event; in any other event, they will be required to provide equal time.

For the reasons stated there, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

WERNER K. HARTENBERGER,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

STEPHEN A. SHARP,
Counsel,
Federal Communications Commission.

OCTOBER 1976.